

M E M O R A N D U M

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FROM: Michael G. Heaton

DATE: June 23, 1997

SUBJECT: CALFED Assurances Work Group

I. Here is my version of what the next iteration of the assurances paper should look like. It should essentially be a "strawman" designed to implement and assure the case study and should include:

1. A specific management structure, based on Alternative 4. We should outline and propose the formation of a new public agency or public corporation, the Delta Ecosystem Restoration Agency (DERA), to manage and implement the Ecosystem Restoration component of the long term Bay Delta Program.

2. A set of agreements among agencies and stakeholders as the foundation of the assurances package. Identify the major agreements, the key points of each, and who the parties are.

a. A Master Agreement (the "Accordo Grande") which describes the principles of the broad agreement on and support for the long term Bay Delta Program, which supports the creation of a new ecosystem management entity in the form of DERA, and which addresses the relationship between the implementation of the ecosystem restoration component, the construction and operation of new facilities, how everything gets paid for, and what benefits are provided to the participants. This is signed by all CALFED agencies and all stakeholders who want either the benefit of the program or the standing to enforce some aspect of the program through dispute resolution or legal action.

b. The agreement among all CALFED agencies and participating stakeholders on the formation of DERA. This agreement will address how DERA will be managed/governed and who will serve on the Board of Directors. It will describe how DERA will be funded and will outline its powers and purposes (e.g., to buy water, land and other property; develop and implement incentive programs).

c. A Habitat Conservation Plan type agreement among USBR, DWR, USFWS, DFG, NMFS, EPA and participating stakeholders (local water agencies). Outline the concept that so long as the ecosystem program operates within the agreed upon parameters (i.e., the boundaries of adaptive management) and so long as the funding parties (USBR, DWR, other stakeholders) continue to pay, the funding parties get a "safe harbor" for their water supply operations and "no surprises" as to future regulatory constraints. (Here we could have some options for different types of indemnity schemes.) This may be more than one agreement; may need an HCP and a separate agreement on adaptive management and another agreement on water supply indemnity. DERA would join in this agreement after its formation.

d. Agreement on funding and crediting, costs and benefits allocation. This may be primarily an agreement among the stakeholders. What federal funds will be sought for what purposes (up front capital); what programs will be funded with bonds; what additional funds will water users provide; what existing funds will be credited to the CALFED program. Once DERA is established, may also need an agreement between DERA and participating stakeholders on use of funds provided by stakeholders.

e. Agreement among USBR, DWR, regulatory agencies and participating stakeholders on how permitting for new facilities will be handled. Basically, need an agreement that ensures that facilities will be constructed in a timely manner, but allows regulatory agencies to require mitigation for "footprint" impacts.

f. Agreement among USBR, DWR and stakeholders (project contractors and other water project operators) on how the existing facilities and the new facilities will be operated, and a process for change operating rules over time as ecosystem program produces results. This would include the proposed changes to the Water Quality Control Plan, water rights permits and licenses and the COA (if necessary). DERA would join in this agreement after its formation.

g. Agreement among CALFED agencies and participating stakeholders on the federal legislative package. At a minimum, federal legislation will be necessary to authorize the formation of the DERA, to authorize federal agencies to participate in DERA and to provide the initial capital funding for DERA's implementation of the ecosystem restoration component, and possibly to get the initial work going on the new facilities. Federal legislation will also be necessary to "incorporate" or integrate certain elements of the CVPIA into the CALFED program.

h. Agreement among CALFED agencies and stakeholders on the state legislative package. State legislation will be necessary to authorize the formation of DERA, state agency participation in DERA and to establish its powers and purposes under state law. State legislation may also be needed to authorize bonds and other revenue sources for ecosystem restoration.

i. Agreement among CALFED agencies and participating stakeholders (and DERA, after its formation) on a dispute resolution process and remedies. What happens in the event of failures or contingencies? What part of the program survives the failure of another part?

3. Assurances for other components of the program and other stakeholder concerns are addressed as follows:

a. Most water quality issues (Export, Environmental, In Delta) will be dealt with by the proposed revisions to the WQCP. Specific actions in the water quality element will be implemented by the SWRCB, the Regional Boards and the Environmental Protection Agency (EPA). In some instances, DERA may provide funding for actions which have water quality benefits.

Additional assurances of urban water quality can be provided by contractual arrangements between USBR/DWR and their contractors, providing financial incentives (or penalties) related to the delivery of raw water of a specified target quality.

DWR, USBR and the export contractors might also enter into agreements to assure that Delta export facilities are operated to preferentially channel water from the isolated conveyance facility to urban areas.

DERA would develop and implement a program designed to encourage waste dischargers (agricultural and urban) to meet water quality targets, by allowing for the transferability of discharge or pollution credits.

The legislative package could include a proposal for water quality targets and for regulatory enforcement mechanisms or incentive programs. Another possibility is to provide for "citizen suits" in the event of non-compliance with water quality objectives.

b. Most of the implementation of the Efficient Water Use Component will be at the local agency level. DWR and USBR will provide technical support and financial assistance for locally implemented water conservation and efficiency improvement programs.

Assurance of compliance with urban and agricultural water conservation and efficiency programs is provided by a certification process administered by the urban and agricultural conservation/efficiency councils. Local agencies which do not have certified plans are not eligible for benefits from the CALFED Program. This would include access to and use of new facilities, the water transfer market or water bank, or financial incentive and technical assistance programs.

Additional assurances on water use efficiency are provided by language in the facilities construction bond instruments which prohibits the use of new facilities to convey either project or purchased water for any urban or agricultural agency which is not certified as efficient.

c. DWR will continue to implement the levee programs. Assurance that the levee programs will be implemented is provided by securing funding not dependent on the annual appropriation process. Thus, funds are provided by bonds, fees imposed upon water users, or other revenue sources.

The legislative package would provide authorization for continued funding for levee maintenance and restoration.

d. Assurances for protection of the Delta as a "common pool" and for the protection of the ag water quality standards in the Delta are provided by the agreements on facilities operations and by the revisions to the WQCP. The physical capacity or size of new conveyance facilities may also provide some assurance that the Delta as a "common pool" will be protected. A 5,000 cfs isolated facility alternative assures that there will continue to be a need to move water through the Delta for export, since export needs cannot be fully met with an isolated facility of that size.

e. Water rights and groundwater protection assurances are provided by water transfer rules, which would be agreed to and adopted by DWR, USBR and the State Board, that permit counties of origin to impose conditions (such as restrictions on quantities or timing) on water transfers out of their counties, based upon criteria designed to protect local economies, environmental conditions and groundwater resources without unduly restricting the water market. (These criteria will have to be negotiated.)

f. Water rights assurances are provided by provisions in the facilities construction bond instruments that preclude use of the isolated system to convey transferred water if the transfer has been vetoed by the county from which the water is being moved.

II. What do we do until the draft EIR/EIS with a preferred alternative comes out? What is the work plan?

1. Continue to revise and refine a draft implementation plan.
2. Incorporate financing plan with assurances.
3. Determine how we will apply screening criteria particularly for management structure.
4. Consider and develop a "through Delta" alternative implementation plan.